STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Edward J. Passarelli	:	
	:	
v.	:	**A.A. No. 14 - 130**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 9th day of January, 2015.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. Mr. Edward J. Passarelli filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that he was not entitled to receive employment security benefits based upon proved misconduct. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; I therefore recommend that the decision of the Board of Review be AFFIRMED.

I
FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Edward J. Passarelli was employed as a security guard by the RI Bureau of Investigations (RIBI) for two years until he was terminated on May 26, 2014. He filed a claim for unemployment benefits but on June 19, 2014, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee Gunter A. Vukic on July 23, 2014. Two days later, the Referee held that Mr. Passarelli was disqualified from receiving benefits because the employer proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> I find by preponderance of credible testimony and evidence the following findings of fact:
>
> Claimant worked as a security guard and would routinely accept additional assignments when offered. March 20, 2014 the claimant was issued a warning addressing a variety of issues including but not limited to working long hours, uniform violations and early departures. April 15, 2014 a written disciplinary action was issued for policy violations that included but not limited to being unshaven and in poor uniform appearance. Client requested removal of the claimant from future assignments. May 14, 2014

> the claimant was issued a final written warning for failure to be in the security shack. Client alleged the claimant was sleeping in his automobile. Claimant alleged he was awake in his automobile listening to the Bruins playoff game. Claimant was given a three day suspension. June 2, 2014 the claimant failed to do the mandatory security rounds for more than six hours. Client requested that the claimant be removed from their site. The final violation resulted in the claimant's discharge.

Decision of Referee, July 25, 2014 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case in this area, Turner v. Department of Employment and Training Board of Review, 479 A.2d 740 (R.I. 1984) — the Referee pronounced the following conclusions:

> * * *
> In cases of termination, the employer bears the burden to prove by preponderance of credible testimony or evidence that the claimant committed an act or acts of misconduct as defined by the law in connection with his work. It must be found and determined that the employer has met their burden.
>
> Claimant's continued disregard for the employer policies and procedures jeopardized the employer's business and ultimately resulted in his discharge. While it was commendable that the claimant attempted to work as many hours as possible, now using that as a contributor for his violations, he was on warning to notify the employer representatives regarding his work schedule and how additional offered assignments would impact him. There is no evidence that the claimant was being forced to take unusually long work days/weeks.

Decision of Referee, July 25, 2014 at 2. The claimant appealed and the Board of Review deliberated on the matter.

On August 29, 2014, the Board of Review unanimously affirmed the decision of the Referee and held that it constituted a proper adjudication of the facts and the law applicable thereto. Decision of Board of Review, August 29, 2014 at 1. As a result, the Board adopted the decision of the Referee as its own. Id. Finally, Mr. Passarelli filed a complaint for judicial review in the Sixth Division District Court on September 12, 2014.

II
APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is

> issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, "misconduct" is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, "misconduct," in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> 'Misconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

III
STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its

[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

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[2] Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[3] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). Also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

IV
ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

V
ANALYSIS

The instant case has proceeded up the three steps of the administrative process that is jointly maintained by the Department of Labor and Training and its Board of Review. At each level — the designee of the Director, the Referee, and finally, the Board of Review — Claimant has been denied benefits based on a finding of proved misconduct. But our role is to examine the decision of the Board to determine whether it is clearly erroneous in light of the facts of record.

A
Factual Review

At the initial hearing before the Referee the employer presented one witness — Mr. Craig Johnson, its human resources manager. Mr. Johnson explained that Mr. Passarelli had been the subject of multiple disciplinary

proceedings within the year. Referee Hearing Transcript, at 8; and see Employer's Exhibits 1A through 1D. On the first, on March 20, 2014, he was counseled regarding "accepting long hours," "early departures," and "uniform violations." Referee Hearing Transcript, at 8. A few weeks later, on April 15, 2014, he was again written up for a uniform violation and not being clean-shaven. Referee Hearing Transcript, at 9. Then, on May 14, 2014, he was suspended for three days and given a final warning after a client had reported that he was sleeping in his vehicle at about 8:00 p.m. Referee Hearing Transcript, at 9, 12-13. The employer also determined that he had missed its 8:00 check-in that evening. Id. Finally, on June 2, 2014, he was fired because a client had reported that he had failed to do mandatory "rounds" (i.e., patrols of the building) during his 4:30 to midnight shift. Referee Hearing Transcript, at 9.

Mr. Johnson conceded that Mr. Passarelli had denied he was sleeping and had insisted that he had been listening to a Boston Bruins' playoff game. Referee Hearing Transcript, at 14. However, Mr. Johnson indicated it was a violation for one of its security guards to be out of the guard shack. Id.

At this juncture Mr. Passarelli gave his side of the story. Referee Hearing Transcript, at 14 et seq. He began by explaining that he was asked to work (and did work) what must be deemed an excessive (if not ridiculous) number of

hours. Referee Hearing Transcript, at 14-15. He called himself the company's "mule." Referee Hearing Transcript, at 16, 17. Mr. Passarelli testified that his supervisors would not "let" him turn down a shift. Referee Hearing Transcript, at 16. But he did admit that he could not say that he was "forced" to work the extended hours. Referee Hearing Transcript, at 18.

B

Rationale

In this case the Board of Review, adopting the decision of Referee Vukic, found that Claimant was terminated for proved misconduct. He urges adamantly that the incidents in question were a result of his employer pressuring him into working an exceptional number of hours.

Now, the Referee (and the Board) did not seem to question Mr. Passarelli's allegation that he was asked and permitted to work an excessive amount of hours. There also seems to be no dispute that his performance of his duties when exhausted had a negative effect on RIBI's relationship with several of its clients. The Board considered these circumstances and, no doubt, others and found that Claimant was responsible for his failings.[4] I cannot state

[4] As the Referee found — and Claimant admitted — he was not "forced" to work these long hours.

that the Board's conclusion was irrational. Quite simply, the fact that others in the company may have been complicit does not exonerate Mr. Passarelli. [5]

Pursuant to the applicable standard of review described supra at 8-9, the decision of the Board of Review must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. Applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that claimant was discharged for proved misconduct in connection with his work — i.e., failing to perform his duties in an appropriate manner — is well-supported by the record and should not be overturned by this Court.

VI
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-

[5] Whether others, at the management level, should have shared his fate is a question beyond the scope of this Court's jurisdiction.

15(g)(3),(4). Further, it is also not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor is it arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

_____/s/_____
Joseph P. Ippolito
Magistrate

January 9, 2015